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JURISDICTION OF THE ADMIRALTY IN CASES OF TORT.

The Constitutional extension of the judicial power of the Federal Government to "all cases of admiralty and maritime jurisdiction," concise and comprehensive as it is, contains latent ambiguities, which have been the occasion of much perplexity and many contradictory decisions. Most of these questions turn upon the meaning to be given to the word "all." (I) Granting that the construction of this word is primarily a judicial one, does it preclude Congress from defining what shall be considered cases of admiralty and maritime jurisdiction? (II) If not, then what shall guide the Court in determining what cases belong to that jurisdiction? (III) Or, is the use of the word "all" designed simply to exclude the jurisdiction of the State Courts, and vest in the Federal Courts the sole power to adjudicate this class of cases? Granting this right to be exclusive, is the character of the jurisdiction gauged by the cause of action or by the method of its enforcement? In its grant of jurisdiction, the language of the Judiciary Act of 1789 is identical with that of the Constitution, vesting "exclusive original cognizance" of such cases in the District Courts, with the reservation of a common law remedy, where the common law is competent to give it. It was the inevitable result of this language that the Supreme Court should hold as it did in *The Moses Taylor*,[1] *The Hine* v. *Trevor*[2] and *The Belfast*,[3] that State laws authorizing proceedings *in rem* according to the course of admiralty procedure exceeded the power of the legislature. These opinions have never been questioned. But that is not the only signification of the word "all."

[1](1866) 4 Wall. 411.
[2](1866) 4 Wall. 555.
[3](1868) 7 Wall. 624.

In but a single instance has Congress attempted to define or meddle with this general grant of jurisdiction. In 1845, an act was passed extending the "jurisdiction" (not the admiralty and maritime jurisdiction) of the District Courts to a limited class of cases arising upon the Great Lakes and their connecting waters.

That Congress was distrustful of its power to extend or limit "the admiralty and maritime" jurisdiction is evident from its careful omission of these words in the title and the enacting clause, although it was provided that the remedies and modes of proceeding should be the same as used by the District Court in cases of admiralty and maritime jurisdiction, and that the maritime law, as administered in these courts, should constitute their rule of decision. The situation was peculiar. Twenty years before this the Supreme Court had decided in *The Thomas Jefferson*,[4] following English precedents, that the jurisdiction of the admiralty was limited to tide waters. It is curious to note that this opinion was delivered by Mr. Justice Story, who ten years before had asserted a very broad jurisdiction of the admiralty courts in his exhaustive opinion in *De Lovio* v. *Boit*,[5] although even in that case he seemed to be content with the English authorities which restricted that jurisdiction to tide waters. But, foreseeing the difficulty into which the Court was being led by the rapidly increasing commerce of the Lakes, he intimated in *The Thomas Jefferson* that perhaps Congress, under its power to regulate commerce, might extend the summary practice of the admiralty to "the Western waters." It was doubtless this suggestion which induced Congress, in the act of 1845, to limit the new jurisdiction to vessels engaged in commerce between ports in different States and Territories. The fallacy of this dictum did not escape the keen eye of Mr. Webster, who promptly exposed it in his argument in *The Lexington*.[6] Speaking of this act, he says:[7]

"Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, and it does extend, to all navigable waters, fresh and salt."

The validity of this act was both upheld and denied by the Supreme Court. In the great case of *The Genesee Chief*,[8] a col-

[4](1825) 10 Wheat. 428.
[5](1815) 2 Gall. 398.
[6](*Sub nom.*) New Jersey Steam Navigation Co. *v* Merchants' Bank (1848) 6 How. 344.
[7]At page 378.
[8](1851) 12 How. 443.

lision upon the Lake Ontario, the power to pass the act under the commerce clause of the Constitution was denied; but the act was recognized, though not directly held to be valid, for the reason that the Lakes and interior navigable waters were subject to the general admiralty and maritime jurisdiction of the United States under the Judiciary Act. So far as the act was limited to commerce between the different States, and reserved a right to a jury trial, it was also treated as valid. In *The Fashion*[9] the Court declined jurisdiction over a contract of affreightment between two ports in Wisconsin, upon the ground of this limitation in the act of 1845, and a doubt which had been expressed in *The Lexington*[9] as to whether contracts purely domestic were within the cognizance of the Federal Courts even in admiralty. The question of jurisdiction was not even discussed in the argument. So, in the case of *The Goliah*,[10] it was held that supplies furnished to a vessel engaged in commerce between two ports in California, upon the Sacramento River, was not within the admiralty jurisdiction, although this river was not embraced by the act of 1845. The question of jurisdiction does not appear to have been argued.

The effect of these cases was to declare that the District Courts upon the Lakes did possess an admiralty jurisdiction under the Constitution, but that the limitations in the act of 1845 applied, and hence that they had no jurisdiction over vessels of less than twenty tons, or of vessels not engaged or licensed for the coasting trade, or over vessels plying between ports in the same State, or over foreign vessels, or vessels engaged in trade with Canada or other foreign countries. Indeed, this was declared in a dictum by Mr. Justice Miller in *The Hine* v. *Trevor*.[11] This result seems the more singular when it is considered that an act to *extend* the jurisdiction of the District Court was really construed to *limit* it.

It is not too much to say that the profession and the courts upon the Lakes disregarded the limitations of the act, and assumed a full jurisdiction under the Constitution and Judiciary Act of 1789. Indeed, the anomalous state of things contemplated by the act could not long continue. Fortunately, it did not. The question was squarely met by the Court in *The Eagle*,[12] a collision in the St. Clair River upon the Canadian side, and in foreign waters. There was no evidence to bring the vessels within the

[9] (*Sub nom.*) Allen *v.* Newberry (1858) 21 How. 244.
[10] (*Sub nom.*) Maguire *v.* Card (1858) 21 How. 248.
[11] (1866) 4 Wall. 555, at 566.
[12] (1868) 8 Wall. 15.

act of 1845, but the Court held this to be unnecessary, that the admiralty jurisdiction was plenary, the act inoperative and inefficient as a grant of jurisdiction upon the general principle that where the main object of a statute, the granting clause, fails, the incidents fall with it. There was an unfortunate exception in the opinion indicating that the right to trial by jury might be preserved; but this has been disregarded, and in the few cases in which a jury trial has been demanded, the verdicts have been regarded simply as advisory and have generally been overruled.[13]

If Congress possessed the unlimited power of the British Parliament, to define the admiralty and maritime jurisdiction of the Constitution, it might have been well to pass a comprehensive act upon that subject; but, as the Constitution stands, it would still be incumbent upon the courts to decide whether Congress had exceeded its power in declaring that this or that case was or was not within the admiralty and maritime jurisdiction vested by the Constitution in the Federal Courts. Suppose, for example, that Congress should declare that all commercial contracts by land or sea should fall within that jurisdiction; or, upon the other hand, that collisions upon the high seas should not fall within it, it is more than probable that the Court would declare the act invalid. So that, whether the question were presented directly, or by an attack upon the constitutionality of an act of Congress, the Supreme Court must be the ultimate arbiter. It seems inevitable, therefore, that the Court must continue for an indefinite time to grope among conflicting codes for the true definition of "all cases of admiralty and maritime jurisdiction," and that Congress at best can play only a minor part. Indeed, this was practically decided in *The Lottawana*,[14] and *The Steamer St. Lawrence*.[15] Its experience with the act of 1845 is not likely to tempt Congress to further experiments of the same nature.

What shall guide the Court in defining this term "admiralty and maritime jurisdiction"? Again we find it hopelessly divided in sentiment, and rendering decisions totally inconsistent with each other. There were several criteria possible, but they were ultimately reduced to two:—the liberal view derived from the practice of the Continental courts, the early practice of the English admiralty court and the practice of the Colonial Vice Admiralty courts, as evidenced by the commissions of their Judges;

[13] The Empire (1884) 19 Fed. Rep. 558.

[14] 21 Wall. 558, at 576.

[15] (1861) 1 Black 522.

and upon the other hand, the stricter view of the English admiralty court at the time of the adoption of the Constitution, curtailed as the practice had been, by the prohibitions of the common law courts. The former view was more popular in the seaboard States, especially in the North, and was championed by Mr. Justice Clifford of the First Circuit, a worthy successor of Justice Story. The latter was favored by the States' Rights Party, which held to the tenets of the common law, and was particularly averse to any interference with "the venerable right of trial by jury." This party was represented from 1841 to 1860 by Mr. Justice Daniel of Virginia, an uncompromising foe of the admiralty jurisdiction, who omitted no opportunity of announcing his dissent from the majority of his brethren whenever an enlargement of that jurisdiction was contemplated by them, or any step made to put it on a footing commensurate with the growing needs of the country. So bitter was he in his resentment to the modern views, which began to take definite shape during his incumbency, that in this particular he may be called the Coke of the Supreme Bench.

The early cases upon admiralty jurisdiction were rare, but they were generally decided upon authority of the English cases, and apparently without a careful consideration of the wholly different conditions under which the questions arose. In the first case, that of *The General Smith*,[16] it was held that there was no lien upon a ship for materials furnished in her home port, unless such lien were given by the local law. This case has been consistently adhered to, notwithstanding a strong effort made by Mr. Justice Clifford with the concurrence of Justice Field in *The Lottawana*[14] to induce the Court to adopt the continental theory that the lien existed under the general maritime law. In view of the large number of prior cases in which the doctrine of *The General Smith*[16] had been approved, and the lack of any sufficient reason for changing it, the *Lottawana* decision is doubtless a sound one, although if the question had then been presented for the first time it would probably have encountered a very serious diversity of opinion.

The supply of labor and materials in the construction and equipment of a ship is dependent upon quite different considerations. This is not of a maritime nature, as the ship does not begin its existence as such until it is launched, and even if the necessaries be furnished after she takes the water, the contract is a mere incident to the original construction and partakes of its non-mari-

[16](1819) 4 Wheat. 438.

time character. In neither case do the necessaries contribute to the navigation of the ship, which, after all, is the true test. But after the ship is completed, it is difficult to say why in principle there should be a distinction between necessaries bought in a foreign port, which may be simply across a river, or in a domestic port. In either case it is a question of presumption of credit. In the case of a domestic ship, the authorities hold to a conclusive presumption that the credit was given to the owner; while in the case of a foreign ship, there is a presumption of fact that credit was given to the ship, but subject to proof of a course of dealing between the parties showing that it was given to the owner. No good reason appears why the presumption should not be one of fact in both cases. The question, however, is not of great importance, as by the local law of most of the maritime States, a lien is given for necessaries furnished to domestic vessels, which the admiralty courts may enforce.

Upon the other hand, in the case of *The Lexington*[6] an action *in personam* for the loss of specie on Long Island Sound, in transit from New York to Providence, the Court declined to follow the English rule which limited the jurisdiction of the admiralty in cases of contracts to seamen's wages, bottomry bonds, and contracts made and to be executed on the high seas. Mr. Justice Nelson said that not only in respect to contracts of affreightment but in cases under the revenue laws, cases of material men and pilotage, the jurisdiction had been asserted in this country, though not in England. Mr. Justice Daniel dissented in a vigorous and exhaustive opinion, in which Justice Grier concurred. Mr. Justice Woodbury concurred in the result, holding the case to be one of tort upon the high seas. In his dissenting opinion Justice Daniel insisted that the constitutional grant should be strictly limited to such cases as the English admiralty court had cognizance of at the time the Constitution was adopted. This dissent was practically reiterated in a dozen cases, and from this position Mr. Justice Daniel never receded an iota.

In this case the Court finally reached the solid ground upon which the definition of admiralty and maritime jurisdiction must forever rest under our present Constitution,—namely, that the contracts of which it takes cognizance must relate to commerce and navigation upon the water, as distinguished from ordinary contracts. Many of this latter class were included in the ancient jurisdiction of the admiralty, but were properly met by prohibitions from the common law courts. The difficulty was that when

the pendulum began to swing that way, it swung too far, and cut out of the admiralty much that in the nature of things properly belonged to it. It was merely another application of the same general principle which induced the Court to hold unanimously in *Insurance Company* v. *Dunham*[17] that a policy of marine insurance was a maritime contract, approving the celebrated decision of Justice Story in *De Lovio* v. *Boit*,[5] which may be said to have laid the foundation of admiralty jurisdiction in this country.

Difficulties will undoubtedly be encountered in determining what are maritime contracts as there formerly were in defining admiralty and maritime jurisdiction, but the foundation having been securely laid, the erection of the superstructure will be a comparatively easy matter. The old English definition that the contract must be made and to be performed at sea is evidently an unsafe criterion, since no one would now contend that a contract to give a deed of real estate, though made and to be performed at sea, would be suable in admiralty, while many if not most maritime contracts are not only made upon the land, but receive their final acquittance there. Indeed, it may be said in general that the contract must have some relation to the equipment or navigation of the ship or the business in which she is engaged, of which instances will occur to every professional man quite too numerous to mention.

Upon the other hand, in cases of *tort*, with which this article is more immediately concerned, it has been settled in this country ever since the case of *The De Soto*[18] that locality is the main, if not the sole, criterion of jurisdiction. Indeed, this has been the English rule from time immemorial. But this case also contained a distinct renunciation of an English principle, in holding that by reason of the vastly greater number, magnitude and length of our interior waters, the rule of *infra corpus comitatus* did not apply here. The collision occurred on the Mississippi River about ninety miles above New Orleans, within the body of a county, but also within the tidal effect. Under the English rule, the Court would have had no jurisdiction, since the body of a county includes all navigable water "where one may see what is done on the one part of the water, and on the other, as to see from one land to the other." But the case is chiefly valuable as containing the first distinct renunciation of English precedents as controlling authority in

[17](1870) 11 Wall. 1.

[18](*Sub nom.*) Waring *v.* Clarke (1847) 5 How. 441.

our courts, although up to that time, and notably in *The Thomas Jefferson*[4] and *The General Smith*[16] they had been treated as conclusive. It was but the first of a series of judicial revolts which has resulted in placing the jurisdiction of the admiralty in this country upon principles consonant with natural justice and our enormous internal commerce. It is certainly a compliment to the inherent good sense of the American rule that, in the Admiralty Court Act of 1861, the English Parliament extended the jurisdiction of their admiralty court even beyond that now obtaining in this country, though its action was probably more immediately due to the reluctant judgment of Sir Christopher Robinson in *Public Opinion*[19] and a few kindred cases.

The case of *The De Soto*[18] was followed five years afterwards by that of *The Genesee Chief*,[8] in which, as already stated, the case of *The Thomas Jefferson*[4] was directly overruled, the *coup de grace* given to the English tide water doctrine, and jurisdiction sustained over all torts occurring upon navigable waters of the United States, regardless of the tidal effect. It was also held, in *The Daniel Ball*,[20] that rivers and other interior waters were navigable in law if they were navigable in fact, but that interior waters, solely within the limits of a single State and having no navigable connection with the waters of other States, were not navigable waters of the United States, and hence not within the admiralty and maritime jurisdiction.

Whether the word "tort" as thus used includes every act within the common law definition of the word, or is confined to such as are in some way connected with the equipment, navigation or discipline of the ship, has not been judicially decided. The former definition would cover every wrongful act done upon navigable waters, such as an assault by one passenger upon another, or an injury suffered by one through the negligence of another, and make locality the sole test of jurisdiction. The latter would limit it to torts committed by the officers or crew in conducting the navigation or enforcing the discipline of the ship. The broader use is within the letter of the definition, but it may well be doubted whether, for example, a libel or a slander put in circulation on board a ship, could be made the basis of a suit in admiralty. Such cases are peculiarly matters within the jurisdiction of common law courts, and a trial by jury. This is the view taken by Mr.

[19] (1832) 2 Hagg. 398.
[20] (1870) 10 Wall. 557.

Benedict in his work upon Admiralty.[21] The suggestion, however, is rather academic than practical, as instances of this kind must be exceedingly rare, while assaults by officers upon seamen are unfortunately frequent, and often attended by the grossest brutality.

A much more serious question, however, arises in cases of what, for want of a better word, may be designated as amphibious torts, by which we understand an injury done upon one element, and a damage suffered upon the other. Cases of this kind are by no means of infrequent occurrence, and usually concern damages suffered by ships by coming in contact with objects affixed to the land, or damages done by ships to bridges, piers, derricks and like fixtures. With regard to this, the rule in England is settled by the Admiralty Court Act in favor of the jurisdiction, while in America the rule was supposed until recently to be as firmly settled the other way.

The question first arose in 1859 in the case of *The Superior*,[22] an action *in personam* by the owner of a ship against a contractor, who had negligently left a submerged pile standing in the bed of the Susquehanna River at Havre de Grace. The question of jurisdiction was briefly disposed of, the Court saying that in cases of tort the locality was the sole test. The decision was unanimous. A similar case was afterwards presented in *Panama Railroad* v. *Napier Shipping Co.*[23] and jurisdiction sustained upon the authority of the former case.

The converse of this case arose in 1865 in *The Plymouth*,[24] which was an action *in personam* against the owner of the propeller *Falcon*, for damage done to certain packing-houses upon a wharf upon the Chicago River, by reason of a fire originating by negligence upon the *Falcon* and communicated to the packing-houses. The *Plymouth*, another vessel, was attached as the property of the owners of the *Falcon*. The argument in favor of the jurisdiction was skilful, philosophical, and at times somewhat fanciful, but no modern authority in point was found either way. The substance of the argument was that the damage was a mere incident to the wrongful act which took place upon navigable waters, and cases were cited tending to show that under the ancient jurisdiction of the English admiralty courts before it was curtailed by

[21] Section 308.

[22] (*Sub nom.*) Phila. Wil. & Balt. R. R. Co. *v.* Phil. & Havre de Grace Steam Towboat (1859) 23 How. 209.

[23] (1897) 166 U. S. 280.

[24] (1865) 3 Wall. 20.

prohibitions, all damage done to wharves, docks and the shores of public rivers was within its cognizance. But the Court held that the cause of action not being completed upon navigable waters, there was no jurisdiction.

This was followed by *Ex parte Phenix Insurance Company,*[25] where the District Court was prohibited from taking jurisdiction of a petition for a limitation of liability occasioned, as in the case of *The Plymouth,*[24] by a fire originating on the vessel and extending to buildings upon the land. The same principle was approved in *Johnson* v. *Chicago & Pacific Elevator Co.*[26] and applied to a case where a vessel ran her jib-boom into a warehouse standing upon the land.

A case not without pertinence to this, presenting a similar question in a different form, is that of *The Rock Island Bridge*[27] —a libel *in rem* against the bridge as an unlawful obstruction to navigation and one which had occasioned injury to certain vessels coming in contact with it. Jurisdiction was denied upon the very persuasive ground that a lien could not exist upon an object affixed to the land. Had the action been *in personam,* it seems probable that, applying *The Superior,*[22] the suit might have been sustained.

These cases had become the settled law of this country, and yet if the question were an original one and the true reason for the existence of an admiralty jurisdiction were examined *de novo,* the result might perhaps have been different. The truth is, that of the many tests applied to define that jurisdiction, none is decisive. Under the English practice until 1861 a maritime contract to be cognizable in admiralty must have been made and to be performed at sea. This doctrine has been long since exploded. Marine contracts are as often made on land as on sea, and though made and to be executed at sea, they are not maritime by reason of that fact. The tide water and *infra corpus comitatus* tests have shared the same fate. It has been said in some cases that the admiralty has no jurisdiction where the courts of common law are competent to give a remedy. This certainly cannot be supported, since practically every cause of action cognizable in admiralty may also be prosecuted at common law, although in many cases, notably in those of collision, negligence and salvage, the measure of damages as well as the methods of procedure are different.

[25] (1886) 118 U. S. 610.
[26] (1886) 119 U. S. 388.
[27] (1887) 6 Wall. 213.

Why, then, do we need admiralty courts at all? And why does an actor, with an option of remedies, almost invariably resort to a court of admiralty? The reason is, and it practically underlies all suits *in rem,* though by no means a test of its jurisdiction, that the party aggrieved has a speedy, certain and efficacious remedy in his lien upon the offending thing, and his right to arrest it and subject it to the payment of his claim. The vessel may be a foreign one, departing perhaps never to return, or the owner may be unknown or reside abroad. But so long as she remains in port, libellant's remedy is unimpaired. It is true that at common law he may attach the ship as the property of the defendant, but subject to all existing liens and mortgages, a security very different from a maritime lien. As the admiralty court is always supposed to be open for business, and witnesses may be examined *de bene esse* as soon as the libel is filed, the case may be tried, freed of all technicalities, before the vessel leaves port. It is submitted, therefore, that in doubtful cases, this consideration affords a substantial reason for supporting the jurisdiction, and that there is no material distinction between damages done by a ship to floating property and damage to property on wharves or shore, and within both the ancient, and since 1861, the modern jurisdiction of the English courts of admiralty.

The case of *The Plymouth*[24] was, however, loyally followed by the inferior courts, and enforced in at least a score of cases involving new applications of the same principle. Indeed, there was nothing to indicate a relaxation of that rule for over forty years, and until the case of *The Blackheath,*[28] where a libel *in rem* was sustained for damages done to a beacon firmly attached to the bottom of the sea. The beacon stood fifteen or twenty feet from the channel, in water twelve or fifteen feet deep, and was built on piles driven firmly into the bottom. "There is no question that it was attached to the realty and that it was a part of it by the ordinary criteria of the common law." The opinion of Mr. Justice Holmes, after examining with much erudition and research the ancient law of England upholding jurisdiction in this class of cases, announces his own view to be that "there seems to be no reason why the fact that the injured property was afloat should have more weight in determining the jurisdiction than the fact that the cause of the injury was." He does indeed draw a somewhat tenuous distinction between that and *The Plymouth,*[24] in the fact that a fire originating on a vessel gave no character to the

[28](1904) 195 U. S. 361.

result, and that the damage was done upon the main-land. But the weight of the decision, or at least of his own opinion, was laid upon the immateriality of the fact that the damage was done to a fixed structure. A small minority of the Court thought the case indistinguishable from *The Plymouth*[24] and notably the *Chicago Elevator* case,[26] where the damage was occasioned by actually running into a building on land; but concurred in the result upon the ground that those cases should be overruled, and the practice conformed to that of England under the Admiralty Court Act, which gave jurisdiction to any claim for damage by any ship. This was held in *The Uhla*[29] to extend to damages to a breakwater, and in *The Lela*,[30] to damages done to a pier.

The consequences of this decision were such as might easily have been foreseen. Taking advantage of the cogent argument in Mr. Justice Holmes' opinion, and confounding the reluctance of an appellate court to overrule itself directly, with its readiness to distinguish prior cases upon narrow grounds, a number of appeals were at once docketed, raising again the question of injury to fixed objects. Two of these were brought on for argument at the last term, one of them, *Cleveland Terminal Company* v. *Steamship Company*[31] concerning damages done by a propeller to a drawbridge over the Cuyahoga River, and its abutments, as well as a dock or wharf. The other, *The Troy*[32] also turned upon damage done to a drawbridge. In both cases the libel was dismissed. The Court applied *The Plymouth*[24] and distinguished *The Blackheath*[28] upon the ground that the bridges in the cases on trial, though upon navigable waters, were connected with the shore and immediately concerned commerce upon the land, while in *The Blackheath*, the beacon was itself an aid to navigation. In ordinary cases, and unless some great public question is at stake, a court cannot be justly criticized for adhering to its prior opinions. As the question involved in *The Plymouth* is of no great practical importance, its application to the later cases was a perfectly natural outcome of the Supreme Court's previous decisions. The fact that the opinion was delivered by the Chief Justice is sufficient assurance that it was not inspired by any animosity to the admiralty jurisdiction. The certainty of the law, however, would have been better conserved, either by following the *Plymouth*[24] case in *The Blackheath*,[28] or overruling it in the subsequent cases.

[29] (1867) L. R. Ad. & Ec. 29, Note 1.
[30] 7 Asp. Mar. Law Ca. 369.
[31] (1907) 208 U. S. 316.
[32] (1907) *Ibid.* 320.

The law, as it stands at present, leaves behind it a large number of questions which will probably require another decade, or perhaps another generation, of judicial explanation. How does it stand with respect to wharves, which are as immediately connected with navigation and as indispensable thereto as beacons? Is the vessel doing the injury still exempt under the *Plymouth*[24] and *Chicago Elevator*[26] cases, or are they distinguished from the cases of the last term as aids to navigation? Or, suppose a beacon be located at the end of a long wharf, as is frequently the case, and damage is done to one or both. Is the ship liable as for damage done to a beacon, or not liable because the damage was done to a wharf? What becomes of the many cases decided in the inferior courts upon the authority of *The Plymouth*;[24]—of *The Professor Morse*,[33] wherein the owner of a marine railway running seven hundred feet under water, and fastened only at the upper end, was held incapable of suing for damage done to it; or of *The Arkansas*[34] where the owner of a warehouse placed in the bed of a river was also debarred from recovery; of *The Maud Webster*,[35] where a vessel ran into a derrick used in constructing a lighthouse pier and temporarily affixed to the land; or, of *The City of Lincoln*,[36] where a cargo of iron broke down a wharf and fell into the river, and recovery against the wharf owner was allowed, because the damage occurred in the water? What of the numerous cases of persons standing upon a wharf and receiving injury from a ship, in which several courts have been hopelessly divided? Two cases are found where men descended a ship's ladder insecurely fastened, slipped and fell.[37] In one of them, the accident occurred by a defect at the top of the ladder; in the other, by a defect at the bottom, and in one case the libellant was allowed to recover; in the other, not. In one case not reported, a man fell from a ship upon a cake of ice in which she was imbedded, and was injured. The question was solemnly argued whether the ice should be treated as land or water. The subtlety of these distinctions suggests the infirmity of a rule which so far separates the cause from the effect, that a libel may be sustained for one, and not for the other.

The difficulties in defining cases of admiralty and maritime jurisdiction, and the many contradictory decisions of the Supreme Court, as contrasted with their unbroken consistency in equity

[33] (1885) 23 Fed. Rep. 803

[34] (1883) 17 Fed. Rep. 383.

[35] (1876) 8 Ben. 547.

[36] (1885) 25 Fed. Rep. 835.

[37] The H. S. Pickands (1890) 42 Fed. Rep. 239; The Strabo (1898) 90 Fed. Rep. 110.

cases, may easily be explained by the different conditions under which we received from the mother country these two systems of jurisprudence. The jurisdiction of the equity courts had been carefully delimited from the middle ages by a succession of able and learned chancellors, who had developed it with such sagacity that but little friction with the courts of common law occurred. It was an easy matter to adopt this system with such changes as the conditions of modern life required. Upon the other hand, the admiralty court had been shorn not only of its usurped jurisdiction, but of much that properly belonged to it; and for the Supreme Court to declare what of the ancient jurisdiction should be retained, and what discarded, required not only an examination of the English, but of the continental systems. The result has been a compromise, but in the main a wholesome compromise. The greatest minds are not insensible to the maxim of *tempora mutantur,* which has really been at the bottom of all this judicial legislation. One thing seems certain,—that the successive steps enlarging that jurisdiction have been taken with the full approbation of the profession, and the general acquiescence of the public. Few, if any, prominent lawyers would be content to see the rule in *The Thomas Jefferson*[4] reinstated; none would wish the limitations of the act of 1845 applied again to the Great Lakes. A still stronger argument in favor of the popularity of the admiralty jurisdiction is the creation of maritime liens by State legislatures, and their attempted enforcement by State Courts. In fact, the whole system of mechanic's liens is really an extension of marine remedies to land contracts, and is based upon the wholesome theory that, where a contract is made for the benefit of a particular thing, or a person is injured by the mismanagement of such thing, the thing itself shall respond in damages.

The lack of a jury trial, which was such a stumbling block to many of the older generation of justices, has not proved unpopular or harmful in practice, and the substitution of nautical assessors to sit with the judge in cases of negligence has received the expressed approbation of the Supreme Court. In fact, it has become generally recognized by the profession that the inexpert jury is not the best tribunal to pass upon the delicate questions of mechanism in patent cases, or the manoeuvering of vessels in collision. By some judges the evils of the admiralty jurisdiction have been depicted as if they seriously threatened our inherent principles of national justice. Notwithstanding that Mr. Justice Johnson

thought, in *Ramsay* v. *Allegre*[38] that the time had arrived (1827) to check "this silent and stealing progress of the admiralty," that progress, which had then but just begun, has continued with but little check for another eighty years. Of like tenor are the almost violent dissents of Justices Daniel and Campbell in *The Magnolia*,[39] wherein the Court took jurisdiction of a collision upon the Alabama River two hundred miles above tide water.

The apprehensions of these Justices, all of whom were able and scholarly men, though emanating from a more dignified source, seem almost as groundless as those of our professional malcontents, the "irreconcilables" of modern political life, who see in the Supreme Court itself an irresponsible and despotic power, plotting to subvert the liberties of the people.

HENRY BILLINGS BROWN.

WASHINGTON, D. C.

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[38](1827) 12 Wheat. 611.

[39](*Sub nom.*) Jackson *v.* Steamboat Magnolia (1857) 20 How. 296.